

### LANDLORD-TENANT LAW

# Lease Allowed Yellowstone Motion “After” Cure Period



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This column has recently spent considerable time addressing various issues surrounding the fundamental procedural device known as the “Yellowstoneinjunction” under New York landlord-tenant law. Established by the Court of Appeals in *First Nat. Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630 (1968), a *Yellowstoneinjunction* tolls the time to cure under a notice to cure or notice of default, so that the tenant can litigate the merits of the alleged defaults and retain the ability to cure if the court ultimately rules that the tenant is in default of the lease.

Under the *Yellowstone* doctrine, all a tenant need show in order to obtain such relief is that it: (1) holds a commercial lease; (2) received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) requested injunctive re-

lief prior to the expiration of the cure period in the notice to cure; and (4) is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. *Graubard Molten Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 N.Y.2d 508 (1999).

### An Unusual Case

With respect to the third prong set forth above, the courts have consistently enforced the rule that an application for *Yellowstone* relief must be made “prior to the expiration of the cure period set forth in the lease and the landlord’s notice to cure.” *Riesenburger Props, LLLP v. Pi Assoc., LLC*, 155 AD3d 984, 985 (2d Dept. 2017), quoting *Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC*, 70 AD3d 646, 647 (2010); *KB Gallery, LLC v. 875 W. 181 Owners Corp.*, 76 AD3d 909, 909 (1<sup>st</sup> Dept. 2010).

Despite this clear rule, in an unusual case that was decided in June 2019 by the Appellate Divi-

sion, Second Department—255 *Butler Associates, LLC v. 255 Butler, LLC*, 173 AD3d 649 (2d Dept. 2019)—the court upheld the Supreme Court’s granting of a *Yellowstone* motion which had been made *after* the expiration of the cure period in the notice to cure, but before the expiration of the termination notice. The court found that because the subject lease provided that the notice of termination (delivered after the expiration of the notice to cure) was required to provide the tenant with an additional period to cure prior to the expiration of the termination notice, such permitted the tenant to move for *Yellowstone* relief after the expiration of the notice to cure, so long as it was made prior to the expiration of the termination notice.

In *Butler*, the landlord had delivered a notice to cure to the tenant, demanding that the tenant cure all violations of the lease on or before Sept. 1, 2015 and, upon the failure to do so, the landlord would have the right to terminate

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the lease. Because the tenant failed to cure within the cure period in the notice to cure, the landlord delivered a “notice of termination of tenancy,” which stated that the tenant failed to cure all of the alleged defaults and that the lease would terminate as of Sept. 30, 2015.

On Sept. 22, 2015—three weeks after the expiration of the notice to cure but prior to the expiration of the termination notice—the tenant moved for a *Yellowstone* injunction. The landlord opposed, maintaining that the motion was untimely under well-established law because it had been made after the expiration of the notice to cure. Supreme Court granted the motion on the ground that the motion was timely because the lease provided for an additional period to cure after the notice to termination is served. The landlord appealed.

The Appellate Division affirmed. The court observed that under Section 24.1(b) of the subject lease, if the tenant failed to observe and perform any provision of the lease, the landlord was permitted to serve a 30-day notice on the tenant requiring that the tenant cure the default. That is exactly what the landlord did in *Butler*, in having delivered the notice to cure to the tenant which expired on Sept. 1, 2015.

What was unusual about the lease in *Butler*, however, was Section 24.2 thereof, which provided that if the

landlord served a notice of termination of the lease following the expiration of the notice to cure, “the lease would expire after the time set forth in the notice of termination elapsed, during which time the plaintiff would have an opportunity to cure the alleged default prior to the expiration date set forth in the notice of termination.”

As such, based upon the language of Section 24.2 of the lease, which permitted the tenant an additional cure period prior to the expiration of a notice of termination, the court found that the termination notice had to be deemed an additional “notice to cure,” and thus the motion for a *Yellowstone* injunction, made prior to the expiration of the termination notice, was timely. The court stated:

Given that the language of Article 24 provided for two separate cure periods in Section 24.1 and Section 24.2, under these circumstances, the notice of termination dated September 11, 2015, must be deemed, under Article 24 of the subject lease, a notice to cure the plaintiff’s alleged default in failing to comply with the prior July 27, 2015 notice. Inasmuch as the plaintiff moved for a *Yellowstone* injunction prior to September 30, 2015, the date set by the defendant in the September 11, 2015 notice as the end date by which the plaintiff had to cure its default, the plaintiff’s motion was timely.

## Conclusion

*Butler* presents the highly unusual case of a lease providing that the notice of termination, delivered after the expiration of the notice to cure, was required to provide the tenant with an additional period of time to cure the alleged defaults prior to the expiration of the notice of termination. In these very specific circumstances, the court granted the tenant’s motion for *Yellowstone* relief made after the expiration of the notice to cure. Careful practitioners, however, would be wise not to take the risk of moving for *Yellowstone* relief after the expiration of the notice to cure, even in circumstances where the lease could be interpreted to give the tenant additional time to cure after service of the notice of termination. To be certain that the motion will not be deemed untimely, one should always move for *Yellowstone* relief prior to the expiration of the cure period in the notice to cure.